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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE HIGH-TECH EMPLOYEE ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS

Master Docket No. 11-CV-2509-LHK

DEFENDANTS' NOTICE OF MOTION, JOINT MOTION TO DISMISS THE CONSOLIDATED AMENDED COMPLAINT, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF [FED. R. CIV. P. 12(b)(1) & 12(b)(6)]

ORAL ARGUMENT REQUESTED

DATE: January 19, 2012
TIME: 1:30 pm
COURTROOM: Courtroom 8, 4th Floor
JUDGE: Honorable Lucy H. Koh

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

RULES

CONSTITUTIONAL PROVISIONS

NOTICE OF MOTION AND MOTION TO DISMISS

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 19, 2012, at 1:30 pm, or as soon thereafter as this matter may be heard in Courtroom 8, 4th Floor, of the United States District Court, Northern District of California, located at 280 South 1st Street, San Jose, California, the Honorable Lucy H. Koh presiding, Defendants Adobe Systems Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc., Lucasfilm Ltd., and Pixar will and hereby do move this Court for an order dismissing the Consolidated Amended Complaint without leave to amend pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1), for failure to state a claim upon which relief can be granted and for failure to allege Article III standing.

This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities in support thereof, any Reply Memorandum, the pleadings and files in this action, and such arguments and authorities as may be presented at or before the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF ISSUES TO BE DECIDED

Defendants Adobe Systems Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc., Lucasfilm Ltd., and Pixar (collectively, "Defendants") move to dismiss the Consolidated Amended Complaint ("Complaint") on the following grounds:

1. The Complaint fails to state a claim upon which relief may be granted under the Sherman Act or California's Cartwright Act because it fails to allege evidentiary facts supporting the claim of an "overarching conspiracy" among all Defendants to suppress the wages of their employees, such a conspiracy is implausible on its face, and the Complaint fails to allege facts to support a claim of injury.

2. The Complaint fails to state a claim upon which relief may be granted under California Business and Professions Code § 16600 because it fails to allege that any Defendants restrained employment by agreeing not to hire each others' employees.

3. The Complaint fails to state a claim upon which relief may be granted under California Business and Professions Code § 17200 because it does not adequately plead unfair competition, Plaintiffs have not lost money or property, and Plaintiffs are ineligible for any of the remedies available under section 17200.

4. Plaintiffs lack standing to assert claims for injunctive or declaratory relief because they are former employees with no stated intention of working for any Defendant, and the alleged conduct has already been enjoined by the DOJ consent decrees.[1]

INTRODUCTION

Plaintiffs filed this complaint on the heels of civil settlements that Defendants reached with the United States Department of Justice relating to employee recruiting practices. As part of

[1] In addition, all Defendants other than Lucasfilm join in Lucasfilm's motion to dismiss the state-law claims based on federal enclave jurisdiction (Dkt. No. 77). As that motion makes clear, the enclave doctrine applies where "some of the events alleged in the Complaint" with respect to some defendants "occurred on a federal enclave." *Corley v. Long-Lewis, Inc.*, 688 F. Supp. 2d 1315, 1336 (N.D. Ala. 2010). Plaintiffs allege that all Defendants participated together in one overarching conspiracy, and that some of the events of that purported conspiracy took place at Lucasfilm's offices in the Presidio, a federal enclave. As such, all Defendants are entitled to dismissal of the state-law claims.

those settlements, in which Defendants admitted no wrongdoing, DOJ alleged that various pairs of Defendants entered into six discrete, *bilateral* agreements spread out over a 2 1/2-year period not to "cold call" each others' employees. In each instance, the DOJ complaint alleged agreements involving only two companies and, with one exception, nothing other than an agreement not to "cold call" each other's employees. As even DOJ recognized, such non-solicitation agreements can be pro-competitive and lawful to prevent poaching of employees in the context of legitimate collaborative projects, and the civil settlements spell out the circumstances in which DOJ would not object to them.

Plaintiffs copy the factual allegations relating to the six bilateral agreements virtually word-for-word from the DOJ complaint, with one critical difference: Apparently recognizing the implausibility of alleging that those agreements harmed them, much less a class of all of Defendants' employees, Plaintiffs instead claim that Defendants entered into a multilateral "overarching" conspiracy among all of them to suppress wages for all of their employees nationwide over a five-year period. This claim (and any claim Plaintiffs might make limited to the alleged bilateral agreements) fails for three reasons:

First, Plaintiffs have alleged no facts to support any "overarching conspiracy" to "fix and suppress the compensation of their employees." (Compl. ¶ 1.) To state an antitrust claim, Plaintiffs must state evidentiary facts—the "who, what, where, and when"—describing the alleged conspiracy. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1046-47 (9th Cir. 2008) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 564 n.10 (2007)). Here, Plaintiffs have not even described what the Defendants allegedly agreed to do. Plaintiffs describe in antitrust boilerplate the purpose of the supposed overarching conspiracy (to "fix and suppress" employee compensation), but they do not allege the terms of the overarching conspiracy or how it functioned. Was it an agreement among all Defendants not to cold call each others' employees, an agreement to enter into six bilateral agreements, or something else? The Complaint does not say. And however the overarching conspiracy is defined, the Complaint provides no facts showing that Defendants communicated with each other about such an agreement, let alone that they reached such an agreement.

The only facts alleged are that Defendants entered into six bilateral agreements, and that some Defendants had overlapping board members. But far from supporting a grand conspiracy theory, the alleged bilateral agreements are inconsistent with that claim. If an overarching conspiracy existed, no bilateral agreements would have been necessary. Likewise, Plaintiffs' allegation that three of the seven Defendants shared board members adds nothing to Plaintiffs' claim of an overarching conspiracy. Membership on multiple boards is commonplace and does not give rise to any inference of illegal conduct. Plaintiffs allege no facts even suggesting that these board members or anyone else joined together to form a conspiracy among all Defendants. In short, Plaintiffs have simply taken the allegations in the DOJ complaint alleging bilateral agreements and labeled them an "overarching conspiracy." Such labels add nothing to the inadequate factual allegations. *Kendall*, 518 F.3d at 1046-47.

Second, an overarching conspiracy consisting of six bilateral agreements is implausible on its face. While Plaintiffs allege a conspiracy to suppress the wages of employees among all Defendants, by Plaintiffs' own allegations Defendants could pursue all of the employees of the other Defendants other than by cold calling, and they remained free even to cold call most of the other Defendants' employees. For example, Intuit is alleged to have had a non-solicitation agreement only with Google. Even assuming that agreement existed, Intuit remained free to cold call the employees of Intel, Lucasfilm, Pixar, Apple, and Adobe—and any other company in the world; and those companies were free to cold call Intuit's employees. It makes little sense to say that Intuit and these five companies were part of a conspiracy to suppress their employees' wages when they all could actively to recruit and hire each others' employees. Plaintiffs' allegation of an "overarching" conspiracy is all the more implausible because they have failed to allege any mechanism by which these Defendants *could* affect employee compensation through this supposed "overarching conspiracy." Defendants are not alleged to be part of any relevant labor market, or to have power in any such market. Because Plaintiffs' antitrust claim rests on the allegations of an "overarching conspiracy," Plaintiffs' failure to plead sufficient facts of such a unitary, overarching agreement is fatal and requires the Complaint to be dismissed.

Third, Plaintiffs have failed to allege facts establishing injury, either from the bilateral

agreements or from an "overarching" conspiracy. Plaintiffs' only claim of injury is that they were impacted in the same way as every other employee of Defendants—by a market-wide suppression of wages. But to support such an allegation, Plaintiffs would need to allege facts showing how any alleged conspiracy caused them injury. They have not even made an effort to do so. Plaintiffs allege *no facts at all* about any relevant labor market or how Defendants have power in any such market. No doubt they recognize that any relevant labor market would be much broader than these seven Defendants, and it would be impossible to allege that Defendants had power in any such market. But without such factual allegations, Plaintiffs have not alleged any factual basis for the conclusory allegations of injury.

Plaintiffs' claim under section 16600 of the California Business and Professions Code also fails because neither the alleged bilateral agreements nor the "overarching conspiracy" is alleged to have restrained employees from engaging in a lawful profession, trade or business, as required for liability under section 16600. Courts distinguish between agreements that restrict *solicitation* of employees—like those alleged here—and those that restrict *hiring* employees, and hold that non-solicitation agreements do not violate section 16600.

Plaintiffs' claim under California Business and Professions Code section 17200 fails as well. First, Plaintiffs have failed to allege facts sufficient to plead unfair competition; thus, like their Sherman Act and Cartwright Act claims, the section 17200 claim cannot stand. Second, Plaintiffs have not lost any money or property, as is required to have standing to assert a section 17200 claim. Third, Plaintiffs are not eligible to seek any of the remedies that are available under section 17200.

Finally, Plaintiffs' claim for injunctive and declaratory relief on each of their claims should be dismissed because they lack standing to seek such relief. All Plaintiffs are former employees of Defendants with no stated intention of returning to their employment. Their alleged injury is wholly backward-looking, and Plaintiffs stand to gain nothing from the injunctive and declaratory relief they seek. Moreover, as part of the settlements with the DOJ, the District Court has already enjoined precisely the conduct Plaintiffs seek to have enjoined here.

The Court should dismiss all of Plaintiffs' claims with prejudice.

BACKGROUND

The DOJ Consent Decrees. In 2009 and 2010, the DOJ conducted a review of alleged "no cold calling" agreements as part of a civil investigation of employment practices of certain companies. (Compl. ¶ 111.) Without admitting any wrongdoing or violation of law (Judgments at 2), Defendants entered into stipulated proposed judgments with the DOJ, pursuant to which they agreed not to engage in non-solicitation agreements except under certain circumstances. (Compl. ¶ 115.[2]) DOJ alleged in its complaint filed as part of the consent decree that its investigation focused on "five *bilateral* no cold call agreements among Adobe, Apple, Google, Intel, Intuit, and Pixar." (Complaint, *United States v. Adobe Sys. Inc., Apple Inc., Google Inc., Intel Corp., Intuit, Inc. & Pixar*, No. 1:10-cv-01629-RBW (D.D.C. Sept. 24, 2010), ¶ 1 (emphasis added).[3]) Both stipulated judgments recognize that there are many circumstances under which Defendants may legitimately agree not to cold call each others' employees. (Judgments § V.) The judgments provide that "[n]othing in Section IV [Prohibited Conduct] shall prohibit a Defendant and any other person from attempting to enter into, entering into, maintaining or enforcing a no direct solicitation provision" provided that such provisions are in writing and meet certain defined standards of reasonable necessity and particularity. (*Id.*) These stipulated judgments carry no prima facie effect in related civil litigation. *See* 15 U.S.C. § 16(a); *United States v. Nat'l Ass'n of Broadcasters*, 553 F. Supp. 621, 623 & n.5 (D.D.C. 1982) (holding that private antitrust actions may not give prima facie effect to government consent decrees entered before oral testimony was taken).

The Follow-On Civil Complaints. Shortly after the Court entered the DOJ consent decrees, Plaintiff Siddharth Hariharan filed the first in a series of complaints against the same

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[2] *See also* Final Judgment § IV, *United States v. Adobe Sys. Inc., Apple Inc., Google Inc., Intel Corp., Intuit, Inc. & Pixar*, No. 1:10-cv-01629-RBW (D.D.C. Mar. 17, 2011); Proposed Final Judgment § IV, *United States v. Lucasfilm Ltd.*, No. 1:10-cv-02220-RBW (D.D.C. May 9, 2011). Because Plaintiffs reference the judgments without attaching them to their Complaint (*see* Compl. ¶¶ 114-115), they are attached to the Declaration of Christina J. Brown filed herewith, as Exhibit A and Exhibit B, respectively. The Court may consider documents referenced but not attached to a complaint without converting a motion to dismiss into one seeking summary judgment. *See Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007).

[3] DOJ later filed a complaint and entered into a similar consent decree with Lucasfilm regarding its alleged bilateral agreement with Pixar.

seven companies that had settled with DOJ. Hariharan alleged that he worked for Lucasfilm as a software engineer for approximately seventeen months, from mid-January 2007 through mid-August 2008. (Compl. ¶ 18.) Thereafter, Plaintiffs Michael Devine, Brandon Marshall, Mark Fitchner, and Daniel Stover filed similar complaints. These additional Plaintiffs alleged that they worked as software engineers at various times for three of the seven Defendants (Adobe, Intel, and Intuit) in three different states (California, Arizona, and Washington). *(Id*. ¶¶ 16-20.) The complaints were assigned to this Court in August 2011, and Plaintiffs thereafter filed a superseding Consolidated Amended Complaint.

Defendants are seven companies—Adobe, Apple, Google, Intel, Intuit, Lucasfilm, and Pixar—described in the Complaint as belonging to an undefined group of "high technology companies." (*Id*. ¶ 43.) Aside from this generic description, the Complaint does not allege that Defendants participate in any particular labor market. In fact, the Complaint says nothing at all about the types of businesses in which these Defendants engage. (*Id.* ¶¶ 21-27.) The omission is apparently tactical, as each Defendant is a well-known company widely covered in mass media and engaged in a wide variety of businesses, including hardware design, various branches of software development, animation, fabrication, film production, gaming, and advertising.

***The Allegations*.** Plaintiffs' factual allegations are taken wholesale, and often verbatim, from the factual allegations in the DOJ complaints. Defendants allegedly entered into six bilateral agreements over a two-year period "not to cold call each others' employees." (*Id*. ¶¶ 59, 73, 79, 85, 98, 104.[4]) These agreements allegedly existed between Apple and Adobe, Apple and Google, Apple and Pixar, Google and Intel, Google and Intuit, and Lucasfilm and Pixar. (*Id.*) The Complaint alleges no other restrictions on Defendants' hiring practices. So, for example, the Complaint does not allege that Intuit had an agreement with any Defendant other than Google, or that Adobe had an agreement with any Defendant other than Apple. In other words, notwithstanding the Complaint's allegation of an "overarching conspiracy," four of the

[4] Only one bilateral agreement is alleged to have had the additional terms that the parties would notify each other if an employee of one company applied for a job with the other company, and that if either company made an offer to an employee of the other company, "neither company would counteroffer above the initial offer." (*Id.* ¶ 61.)

Defendants remained free to cold call and pursue the employees of every Defendant except one.

The only allegations of an "overarching conspiracy" are that it "consisted of an interconnected web of express agreements, each with the active involvement and participation of a company under the control of Steven P. Jobs ("Steve Jobs") and/or a company that shared at least one member of Apple's board of directors." (*Id.* ¶ 55.) Stripped of rhetorical flourish, this allegation says only that Mr. Jobs sat on the boards of Pixar and Apple, and Google's Eric Schmidt and Arthur Levinson both sat on the boards of Apple and Google. The Complaint does not explain how these overlapping board memberships establish any "interconnection" among the alleged bilateral agreements, much less support a broader conspiracy. That's it—the sum and substance of the allegations of a grand conspiracy.

Based on these allegations, the Complaint asserts claims under Section 1 of the Sherman Act, California's Cartwright Act, and sections 16600 and 17200 of the California Business and Professions Code. (*Id.* ¶ 5.) Plaintiffs seek to represent a class of all "salaried" employees of Defendants over a five-year period regardless of the positions they held, with exclusions for retail employees and Defendants' corporate officers, board members, and senior executives. (*Id.* ¶ 30.) By its terms, the class would include not only software engineers like the named plaintiffs, but also secretaries, accounting personnel, janitors, and in-house counsel.

LEGAL STANDARD

***Failure to State a Claim*.** To survive a motion to dismiss, a complaint must plead sufficient factual matter, if accepted as true, to state a claim to relief that is plausible on its face. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Twombly*, 550 U.S. at 555. Plaintiff must plead "factual content [that] allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. This standard incorporates two important, related principles. First, a complaint cannot rest on conclusory assertions, nor simply allege legal conclusions masquerading as facts. *See Kendall*, 518 F.3d at 1048. *Twombly* and the cases following it require that a complaint allege "not just ultimate facts (such as a conspiracy), but *evidentiary facts* which, if true, will prove" the alleged violation. *Id.* at 1047 (quoting *Twombly*, 550 U.S. at 555) (emphasis added); *see also Iqbal*, 129 S. Ct. at 1950 (courts are "not

bound to accept as true a legal conclusion couched as a factual allegation") (internal citation omitted); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (court need not accept "merely conclusory, unwarranted deductions of fact"). In the Ninth Circuit's formulation, the complaint must "answer the basic questions: who, did what, to whom (or with whom), where, and when?" *Kendall*, 518 F.3d at 1047.

Second, plaintiffs' allegations must state a claim that is plausible. In other words, it is not enough to allege specific facts unless those facts plausibly add up to a claim for relief. *See Iqbal*, 129 S. Ct. at 1949-50 ("only a complaint that states a plausible claim for relief survives a motion to dismiss"); *see also DM Research, Inc. v. Coll. of Am. Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999) (upholding district court's dismissal of antitrust complaint because the alleged conspiracy was "highly implausible") (cited approvingly in *Twombly*, 550 U.S. at 557). In antitrust cases, the requirement of plausibility means that the facts alleged must be "'plausible' in light of basic economic principles." *William O. Gilley Enters. v. Atl. Richfield Co.*, 588 F.3d 659, 662 (9th Cir. 2009). When a plaintiff alleges similar conduct by defendants to support a conspiracy claim, the complaint must do more than allege parallel conduct or actions that are consistent with a defendant's independent self interest. "Allegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws." *Kendall*, 518 F.3d at 1049; *see also Twombly*, 550 U.S. at 554. [5]

Twombly emphasizes that courts in antitrust cases must scrutinize closely the allegations of an "agreement" at the pleading stage because antitrust litigation can be costly and burdensome. 550 U.S. at 558-59. Noting that "[i]t is no answer to say" that meritless claims can be weeded out in the discovery process, the Court cautioned that "it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous

[5] Federal pleading standards govern claims brought in federal court, including those arising under state law. *In re Graphics Processing Units Antitrust Litig.* ("*GPU*"), 527 F. Supp. 2d 1011, 1025 (N.D. Cal. 2007) (applying *Twombly* in dismissing federal and state antitrust claims); *see also Church & Dwight Co. v. Mayer Labs, Inc.*, 2011 U.S. Dist. LEXIS 35969, at *55-61 (N.D. Cal. Apr. 1, 2011) (applying *Twombly* to Cartwright Act and UCL claims).

expense of discovery" in meritless cases. *Id.* at 559; *see also Kendall*, 518 F.3d at 1047.[6]

Lack of Standing. A plaintiff has the burden of establishing standing under Article III of the U.S. Constitution. *Takhar v. Kessler*, 76 F.3d 995, 1000 (9th Cir. 1996); *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121-22 (9th Cir. 2010). When a plaintiff lacks Article III standing, the court lacks subject matter jurisdiction, and the case should be dismissed. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004).

ARGUMENT

I. THE COURT SHOULD DISMISS PLAINTIFFS' ANTITRUST CLAIMS UNDER *TWOMBLY*.

A. The Complaint Does Not Allege Sufficient Evidentiary Facts of an Overarching, Multilateral Conspiracy.

Virtually all of the facts alleged in the Complaint relate to six bilateral agreements among the Defendants. (Compl. ¶¶ 56-71 (facts regarding alleged Lucasfilm-Pixar agreement); ¶¶ 72-78 (Apple-Adobe); ¶¶ 79-84 (Apple-Google); ¶¶ 85-91 (Apple-Pixar); ¶¶ 97-102 (Google-Intel); ¶¶ 103-107 (Google-Intuit).) From these limited allegations, Plaintiffs leap to their claim of an "overarching" conspiracy among all of the Defendants. As discussed below, Plaintiffs' claim fails.

1. The Court Must Disregard the Complaint's Labels, Conclusions, and Boilerplate Allegations of an Overarching Agreement.

The Court must ignore "labels and conclusions" and "formulaic recitation[s] of the elements of a cause of action." *See Iqbal*, 129 S. Ct. at 1949-50 (conclusory allegations are not "entitled to the assumption of truth"); *Gilley*, 588 F.3d at 651. A bare assertion of the existence of an unlawful agreement is a "legal conclusion" that does not satisfy the pleading standards for an antitrust claim. *Church & Dwight Co. v. Mayer Labs., Inc.*, 2011 U.S. Dist. LEXIS 35969, at *56-59 (N.D. Cal. Apr. 1, 2011) (citing *In re Netflix Antitrust Litig.*, 506 F. Supp. 2d 308, 320 (N.D. Cal. 2007)).

[6] Based in part on *Twombly*'s admonition that courts should be vigilant in ensuring that the governing pleading standards are satisfied in antitrust cases to prevent time-consuming and expensive discovery on meritless claims, Defendants are contemporaneously filing a motion to stay discovery temporarily until the Court rules on this motion to dismiss.

Here, labels and conclusions are what Plaintiffs use to support their claim of a grand conspiracy. Plaintiffs repeatedly describe the alleged conspiracy as an "interconnected web of express agreements" (Compl. ¶¶ 1, 55), an "interconnected web of agreements" (*id.* ¶ 108), and an "overarching conspiracy" (*id.* ¶¶ 55, 108). But such conclusions and labels add nothing to the factual foundation for Plaintiffs' claims and must be disregarded. *See, e.g.*, *Twombly*, 550 U.S. at 555; *Sprewell*, 266 F.3d at 988.

Similarly, Plaintiffs' recitations of the elements of the claim are not evidentiary facts under *Twombly*. For example, Plaintiffs allege that each of them was "injured in his business or property by reason of the violations alleged herein" (Compl. ¶¶ 16-20), they recite the elements of a Sherman Act and Cartwright Act claim (*id.* ¶¶ 119-135), and they allege generically that Defendants "entered into the express agreements and the overarching conspiracy with knowledge of the other Defendants' participation, and with the intent of accomplishing the conspiracy's objective" (*id.* ¶ 108). These are precisely the kind of rote allegations that the Ninth Circuit has rejected as insufficient. *Kendall*, 518 F.3d at 1048.

In *Kendall*, plaintiffs claimed that the defendant banks and credit card companies conspired to set the amounts of payment card transaction fees. Plaintiffs alleged that defendants had "knowingly, intentionally and actively participated in an individual capacity in the alleged scheme." The Ninth Circuit held that this allegation was conclusory and entitled to no weight in the *Twombly* analysis. *Kendall*, 518 F.3d at 1048; *see In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 962 (N.D. Cal. 2007) (rejecting as insufficient "several conclusory allegations that the defendants agreed to increase late fees," which provided "no details as to when, where, or by whom this alleged agreement was reached"); *In re Graphics Processing Units Antitrust Litig.* ("*GPU*"), 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007) ("Plaintiffs allege in conclusory fashion that defendants fixed prices pursuant to an agreement, but that allegation is simply too conclusory to show a plausible entitlement to relief."). The Court should similarly disregard Plaintiffs' boilerplate allegations here.

2. The Alleged Overarching Conspiracy Fails to Satisfy *Twombly*.

Apart from conclusions and labels, there is nothing to support Plaintiffs' alleged

overarching conspiracy. The Complaint "must show some meeting of the minds," *Gilley*, 588 F.3d at 665, to support a conspiracy claim, but the Complaint does not even describe what all the Defendants are alleged to have agreed upon. The only restrictions on Defendants' recruiting practices alleged in the Complaint are those contained in the six alleged bilateral agreements (and even those are insufficient to support any alleged antitrust violation, as discussed below). But this reduces Plaintiffs to arguing that Defendants entered into an overarching conspiracy to enter into six bilateral agreements, which is nonsensical. The six alleged bilateral agreements do not add up to an overarching conspiracy because, by Plaintiffs' own allegations, these bilateral agreements left Defendants free to cold call and otherwise pursue most of the employees who were the supposed target of this alleged conspiracy (not to mention the employees of every other company in the world). In fact, the bilateral agreements are themselves inconsistent with a claim of a grand conspiracy. Such an overarching theory would have rendered the alleged bilateral agreements unnecessary.

Other than the bilateral agreements, Plaintiffs assert that "every agreement alleged herein directly involved a company either controlled by Steve Jobs, or a company that shared a member of its board of directors with Apple." (Compl. ¶ 108.) Plaintiffs characterize Steve Jobs as "controlling" Apple when the agreements were entered, and note that Mr. Jobs was Disney's largest shareholder when Apple and Pixar (then a subsidiary of Disney) entered into their alleged agreement. *(Id.* ¶ 87.) Plaintiffs also observe that Arthur Levinson sat on the boards of both Apple and Google at the time of their alleged agreement (*id.* ¶ 79), and that Eric Schmidt, the CEO of Google, sat on Apple's board of directors when Google allegedly entered into agreements with Intel and Intuit. (*Id.* ¶ 97.)

But none of that suggests an overarching conspiracy. Nowhere does the Complaint allege facts to show that Messrs. Jobs, Levinson, or Schmidt engaged in any conduct that would support the claim that these agreements are in some way "interconnected," or even that they knew of any agreements other than those involving their own companies. Nor does the Complaint allege that service on Apple's board of directors somehow facilitated these bilateral agreements, let alone transformed them into anything "overarching." In fact, the Complaint does not allege a single

communication that even suggests an overarching conspiracy, as opposed to discrete bilateral agreements. It contains no description of when the supposed overarching conspiracy was reached, and no allegation of who at each company supposedly joined this grand conspiracy. Plaintiffs have done nothing more than allege that three of the seven Defendants shared common board members.

Service on multiple boards is commonplace and not evidence of a conspiracy. *See, e.g.*, *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1561 (10th Cir. 1984) (interlocking board memberships were not a per se violation of the Sherman Act). Such allegations are less meaningful even than common membership in trade associations and joint ventures, which courts have repeatedly found to be insufficient to support a claim of conspiracy. *See, e.g.*, *Twombly*, 550 U.S. at 556 n.12; *Gilley*, 588 F.3d at 669; *GPU*, 527 F. Supp. 2d at 1014-17, 1023; *In re Late Fee*, 528 F. Supp. 2d at 963; *Arista Records LLC v. Lime Group LLC*, 532 F. Supp. 2d 556, 579 n.30 (S.D.N.Y. 2007) ("mere opportunity to conspire" does not support inference of conspiracy); *see also In re Citric Acid Litig.*, 191 F.3d 1090, 1103 (9th Cir. 1990) (rejecting plaintiff's attempt to infer a conspiracy from multiple meetings and telephone conversations, as such meetings "do not tend to exclude the possibility of legitimate activity."). Plaintiffs' allegations of overlapping board membership is particularly empty here given that it is limited to three of the seven Defendants.

The alleged bilateral agreements themselves, even if similar in nature, also do not "tend[] to exclude the possibility of independent action" by the parties to each of the bilateral agreements. *Twombly*, 550 U.S. at 554; *see also In re Late Fee*, 528 F. Supp. 2d at 962 (granting defendants' motion to dismiss plaintiffs' Cartwright Act claim because plaintiffs, having alleged only "parallel conduct" to increase late fees, did not meet the *Twombly* pleading standard); *GPU*, 527 F. Supp. 2d at 1023 (dismissing plaintiffs' complaint in part because plaintiffs' allegations of similar pricing structure and product release schedule were "just as consistent with coincidence as they are with conspiracy").

In *In re Iowa Ready-Mix Concrete Antitrust Litig.*, 768 F. Supp. 2d 961 (N.D. Iowa 2011), the court rejected a strikingly similar attempt by private plaintiffs to convert multiple bilateral

agreements into one conspiracy among all defendants. *Id.* at 972. The defendants there had pleaded guilty to criminal antitrust violations "as to certain *bilateral* agreements" regarding ready-mix concrete in the state of Iowa, *id.* at 975 (emphasis in original), and the plaintiffs alleged that those bilateral agreements were sufficient to allege an "industry-wide" conspiracy. *Id*. at 972. The court rejected that argument and dismissed the complaint, holding that "[w]hat is missing . . . is the 'larger picture' from which inferences of a wider conspiracy can be drawn." *Id.* at 975; *see also In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 348-49 (3d Cir. 2010) (allegations of substantially similar agreements among certain groups of defendants were insufficient to allege a global conspiracy); *In re Elevator Antitrust Litig.*, 502 F.3d 47, 52 (2d Cir. 2007) (allegations of agreement among defendants in Europe were insufficient to allege a similar agreement in the United States). The same is true here. Plaintiffs have not alleged any "larger picture" to support their claim of an overarching conspiracy.

Instead, the alleged bilateral agreements are nothing more than allegations of parallel behavior among pairs of Defendants. Such allegations of parallel conduct cannot support Plaintiffs' conspiracy claim here because the alleged bilateral agreements are not *inconsistent* with independent action. *See Twombly*, 550 U.S. at 554; *see also GPU*, 527 F. Supp. 2d at 1024. In fact, such non-solicitation agreements are judged under a rule of reason analysis and widely recognized as pro-competitive and a legitimate way to allow companies to work in collaborative ventures without fear of exposing themselves to "poaching" of their employees. *See, e.g.*, *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 899-900 (9th Cir. 1983) (finding that agreement not to "raid" a former employer's staff is not an unreasonable restraint); *Eichorn v. AT&T Corp.*, 248 F.3d 131, 145-56 (3d Cir. 2001) (holding that agreement not to hire, retain, or solicit employees was reasonable to ensure workforce continuity during sale of subsidiary). Even the DOJ, whose allegations Plaintiffs copy wholesale, recognized the pro-competitive benefits of non-solicitation agreements.[7] Given that the alleged bilateral agreements stood on their own and did not depend

[7] The DOJ consent decrees allow Defendants to enter into and enforce no-direct-solicitation provisions under many different circumstances. Defendants are free to use such agreements to the extent they are reasonably necessary for the functioning of legitimate collaboration agreements, such as joint development, technology integration, joint ventures, teaming agreements and other joint projects, and the shared use of facilities (Judgments § V.A.5(iii)); for a

on the existence of any other agreement or the participation of any other company, Plaintiffs cannot allege that the bilateral agreements alone "tend[ed] to exclude the possibility of independent action" by each pair of Defendants. *Twombly*, 550 U.S. at 554.

Finally, if Plaintiffs hope to turn their allegations of an "interconnected web of agreements" into a "hub-and-spoke" conspiracy, there would have to be a hub and spokes—none of which is alleged here. It is well-settled that where parties have not agreed to the overarching conspiracy, "there is no wheel and therefore no hub-and-spoke conspiracy." *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 420 (5th Cir. 2010); *see also PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 110 (2d Cir. 2002) (holding that plaintiffs failed to offer adequate evidence of a horizontal conspiracy without "direct evidence of communication" or similar indications of a mutual agreement); *Dickson v. Microsoft Corp.*, 309 F.3d 193, 203-04 (4th Cir. 2002) (dismissing a "rimless wheel antitrust conspiracy" supported by "separate agreements with a common defendant" due to lack of mutual agreement). Here, Plaintiffs do not allege any shared communications among all Defendants, or any other evidence suggesting that Defendants as a group had a "meeting of the minds" regarding their hiring practices. *See, e.g.*, *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 257 (3d Cir. 2010) (dismissing allegations of conspiracy where "[p]laintiffs have failed to allege any facts plausibly suggesting a unity of purpose, a common design and understanding, or a meeting of the minds between and among" defendants).

The Complaint fails to provide the most basic "who, what, where, and when" of the overarching conspiracy required by *Kendall*, and that failure requires dismissal of the Complaint.

B. The Overarching Conspiracy Alleged by Plaintiffs Is Implausible.

To support an antitrust claim, the alleged conspiracy must be "'plausible' in light of basic economic principles." *Gilley*, 588 F.3d at 662. Plaintiffs' alleged "overarching conspiracy" is not only unsupported by factual allegations, *see supra*, but it is entirely implausible.

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wide range of business transactions, including mergers, acquisitions, investments, divestitures; in contracts with consultants, auditors, vendors, recruiting agencies, or providers or temporary or contract employees (*id.*§§ V.A.2-3), and in settlement or compromise of legal disputes, and employment or severance agreements with their employees (*id.* §§ V.A.4, V.A.1).

Plaintiffs allege that there were six bilateral agreements among the seven Defendants. For each bilateral no cold-call agreement, the Complaint alleges only that the two companies to the agreement agreed "not to cold call *each other's* employees." (Compl. ¶¶ 59, 73, 79, 85, 98, 104 (emphasis added).) The two parties to each alleged bilateral agreement thus could cold call employees from any of the other Defendants. For example, the alleged agreement between Adobe and Apple alleges that "Apple and Adobe agreed not to cold call each other's employees." (*Id*. ¶ 73.) The Complaint does *not* allege, nor could it rationally, that Adobe and Apple agreed to refrain from cold calling the employees of other companies. Thus, even if the alleged bilateral agreements existed, the Adobe-Apple agreement left Adobe free to cold call and pursue the employees of Intel, Intuit, Google, Lucasfilm, and Pixar—and all the other companies in the world—and those companies were obviously free to cold call and pursue Adobe employees.

Even viewing the six alleged bilateral agreements together, the Defendants remained free to cold call and pursue most of the other Defendants' employees. By the Complaint's express terms, four Defendants (Adobe, Intel, Intuit, and Lucasfilm) could cold call employees from five of the other Defendants and vice versa, one Defendant (Pixar) could cold call employees from four of the other Defendants and vice versa, and two Defendants (Apple and Google) each could cold call employees from three of the other Defendants and vice versa. Of the twenty-one possible pairings of Defendants, the alleged bilateral agreements left fifteen pairs free to solicit each other's employees in any manner they chose, including cold calling.

To say that any Defendant was part of an overarching no-cold-calling conspiracy with six other Defendants to suppress wages while it remained free to cold call employees from most of those Defendants—and could likewise have its own employees cold called by other Defendants—makes no sense at all. The Complaint's own allegations regarding the limited scope of the alleged bilateral agreements belie the existence of any "overarching conspiracy." *Cf. Gilley*, 588 F.3d at 662-63 (recognizing California Supreme Court's judgment in related *Aguilar* case that allegations of forty-four bilateral exchange agreements among pairs of defendants were not evidence of an overarching conspiracy) (citing *Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826, 863 (2001) (disregarding evidence of bilateral exchange agreements, which "does not even imply

collusive, rather than independent, action")).

Plaintiff's theory of an overarching conspiracy is also implausible because they have alleged nothing to suggest that Defendants participate in, let alone individually or collectively control, any particular labor market. (Compl. ¶¶ 21-27.) Without any such allegations, Plaintiffs have not alleged any plausible economic basis to believe that Defendants entered into an overarching conspiracy with each other. *See In re Iowa Ready-Mix*, 768 F. Supp. 2d at 976 (rejecting claim of "overall conspiracy" among defendants as "implausible" in light of the nature of ready-mix concrete and plaintiffs' failure to allege a geographical market); *see also Newcal Indus., Inc. v. IKON Office Solution*, 513 F.3d 1038, 1044 (9th Cir. 2009) (to state an antitrust claim, a "plaintiff must allege both that a 'relevant market' exists and that the defendant has power within that market"). *Compare, e.g., In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1139 (N.D. Cal. 2009) (denying motion to dismiss where three defendants allegedly controlled 90% of the NAND Flash market); *In re Static Random Access Memory Antitrust Litig.* ("*SRAM*"), 580 F. Supp. 2d 896, 901 (N.D. Cal. 2008) (denying motion to dismiss where defendants allegedly controlled more than 75% of the SRAM market).

C. Plaintiffs Have Failed to Allege Facts to Support a Plausible Claim of Injury.

An antitrust plaintiff must have suffered antitrust injury, that is, "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1055 (9th Cir. 1999) (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990)). This requirement comes from Section 4 of the Clayton Act, which creates a private right of action under the Sherman Act for a plaintiff who has been "injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a).

"Naked assertions" of antitrust injury do not state a claim. Instead, an antitrust plaintiff "must put forth factual 'allegations plausibly suggesting (not merely consistent with)' antitrust injury." *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 451 (6th Cir. 2007); *see also Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters* ("*AGC*"), 459 U.S. 519, 538-40 (1983) (antitrust standing requires, among other things, a direct causal connection between the

asserted injury and the alleged restraint of trade); *CBS Cos. v. Equifax, Inc.*, 561 F.3d 569, 572 (6th Cir. 2009) (antitrust claim properly dismissed for failure to allege facts supporting alleged reduction in competition); *City of Pittsburgh v. W. Penn Power Co.*, 147 F.3d 256, 267-68 (3d Cir. 1998) (allegations of speculative injury are inadequate to state an antitrust claim).

Plaintiffs here have not pleaded any facts showing that they suffered any specific injury, let alone an injury caused by the alleged overarching conspiracy. Plaintiff Hariharan, for example, states that he worked as a software engineer for Defendant Lucasfilm from January 2007 through August 2008 (Compl. ¶ 18), presumably joining Lucasfilm from some other company that was even by his allegations paying a fully competitive salary. He does not allege that he ever desired to work for another Defendant, that he would have taken a job or considered taking a job with another Defendant, or that the alleged overarching conspiracy affected his employment choices in any way. The same holds true for the other named Plaintiffs.[8]

Instead, Plaintiffs offer the broad and conclusory assertion that they were harmed in the same way as every other employee of Defendants because the overarching conspiracy had the "effect of fixing the compensation of the employees of participating companies at artificially low levels." (*Id.* ¶ 108.) This theory of injury suffers from fundamental, incurable problems. The Complaint contains no description of Defendants' businesses, no discussion of the types of employees they hire, and no allegation that Defendants participate in, let alone individually or collectively control, any particular employment market. (*Id.* ¶¶ 21-27.) Plaintiffs have utterly failed to supply these missing allegations—notwithstanding how readily available information is about Defendants' businesses—because there is demonstrably no such market that Plaintiffs could allege. And that failure is fatal to Plaintiffs' claims. Without any allegation that Defendants have power in a relevant labor market, Plaintiffs have not alleged any plausible basis for their claim that they were injured by the supposed overarching conspiracy. *See Newcal*, 513 F.3d at 1044 (to state an antitrust claim, a "plaintiff must allege both that a 'relevant market'

[8] Factors relevant to injury include an employee's salary history, educational and other qualifications, ability and willingness to relocate to a different employer, and ability to seek employment in other industries in which her skills could be utilized. *Weisfeld v. Sun Chem. Corp.*, 210 F.R.D. 136, 144 (D.N.J. 2002), *aff'd*, 84 F. App'x 257 (3d Cir. 2004).

exists and that the defendant has power within that market").

The best that Plaintiffs can do is allege that Defendants are "high technology companies." (Compl. ¶ 43 ("Defendants and other high technology companies . . . .").) But that is hardly an effort to define a labor market and is, in any event, not helpful. As the Complaint admits, there are "other high technology companies" besides Defendants. (*Id.*) And yet the Complaint does not attempt to explain how the alleged overarching conspiracy could suppress their employees' wages given all the options available to those employees. *See Consultants & Designers, Inc. v. Butler Serv. Grp., Inc.*, 720 F.2d 1553, 1563 (11th Cir. 1983) (noting that employees "had as an alternative all the other means of obtaining employment in their chosen fields" and rejecting notion that restrictive employment covenant violated § 1 of the Sherman Act).

It gets worse. Plaintiffs do not limit their allegations to any specific subset of "high technology" employees, but instead allege that Defendants conspired to suppress the wages of *all* of their salaried employees nationwide—regardless of what type of job they held. (*Id.* ¶ 108 ("Defendants succeeded in lowering the compensation and mobility of their employees below what would have prevailed in a lawful and properly functioning labor market."); *id.* ¶ 29 (defining class to include all salaried employees, excluding only retail employees, corporate officers, board of directors, and senior executives who entered into the alleged conspiracy); *id.* ¶ 110 ("Plaintiffs and each member of the Class were harmed by each and every agreement herein alleged.").) As alleged, this across-the-board conspiracy impacted the full array of Defendants' employees, including secretaries, accountants, marketing personnel, receptionists, software engineers, janitors, and in-house counsel.[9] These employees plainly are not limited to working for "high technology companies," and, as a result, Defendants would be competing against an even broader array of companies for their employees.

Given the many different types of employees that Defendants hire, and no allegations that Defendants comprise a controlling share of any relevant employment market, Plaintiffs have failed to supply any economically rational support for their claim that they were injured by the

[9] Plaintiffs' conspiracy theory would also bring within its sweep categories of employees that only one Defendant hires, such as Intel's fabrication workers at its U.S. manufacturing facilities.

overarching conspiracy they have invented. *See, e.g.*, *In re Flash Memory*, 643 F. Supp. 2d at 1144-45 (noting that a concentrated market share among alleged conspirators is relevant to the plausibility of a conspiracy); *Todd v. Exxon Corp.*, 275 F.3d 191, 202 (2d Cir. 2001) (relevant labor markets include all jobs that are reasonably good substitutes for employees seeking a job change); *Eichorn*, 248 F.3d at 147-48.

The Complaint appears to allege at times that Plaintiffs were injured by *each* of the bilateral agreements, separate and apart from any "overarching conspiracy." (*See* Compl. ¶ 110 ("Plaintiffs and each member of the Class were harmed by each and every agreement herein alleged."); *id.* ¶ 71 (alleging that Lucasfilm employees were harmed by alleged bilateral agreements to which Lucasfilm was not a party).) The Complaint does not provide any factual support for this alleged harm, and it fails for the same reasons that their claim of injury from the alleged overarching conspiracy fails—Plaintiffs have made no effort to allege how they were injured, such as by defining a relevant market and injury arising from Defendants' power in that market. *See, e.g.*, *Newcal*, 513 F.3d at 1044 (plaintiff must allege that defendant has market power within a relevant market). In addition, any injury Plaintiffs allege they suffered because of a bilateral agreement between companies other than their own employers—for example, that Lucasfilm employees were injured by the alleged agreement between Google and Intuit not to cold call each other's employees—fails for the further reason that such injury is far too speculative and remote from the alleged cause to support an antitrust claim. *See AGC*, 459 U.S. at 540-42 (plaintiff whose alleged injuries were indirect and remote lacked standing to assert antitrust claim); *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 541 (9th Cir. 1987) (in evaluating claim of injury, court must "examine the directness or indirectness of the causal connection between the alleged injury and the alleged violation").

Plaintiffs' antitrust claims should be dismissed.

II. PLAINTIFFS' CLAIM UNDER CALIFORNIA BUSINESS AND PROFESSIONS CODE § 16600 FAILS BECAUSE THAT STATUTE DOES NOT RESTRICT NON-SOLICITATION AGREEMENTS.

Plaintiffs have failed to state a claim for relief under California Business and Professions Code § 16600, which declares void contracts that "restrain[] [employees] from engaging in a

lawful profession, trade, or business of any kind." Cal. Bus. & Prof. Code § 16600. When analyzing potential violations of section 16600, courts draw a clear distinction between no-hire agreements that may actually restrain employment and non-solicitation agreements that only limit one means of contact about potential employment. The law is clear that non-solicitation agreements do not violate section 16600. *See, e.g.*, *Thomas Weisel Partners LLC v. BNP Paribas*, 2010 WL 546497, at *4-6 (N.D. Cal. Feb. 10, 2010).

Here, Plaintiffs make no allegation that Defendants had any agreement *not to hire* each others' employees. Instead, the Complaint alleges restraints in a series of bilateral agreements related to the method for recruiting employees, whereby one Defendant allegedly agreed with another *not to solicit* each others' employees through cold calling. (*See* Compl. ¶¶ 41-54 (general cold-calling allegations), ¶¶ 72-73 (alleged Apple-Adobe agreement), ¶ 79 (Apple-Google), ¶ 85 (Apple-Pixar), ¶ 98 (Google-Intel), ¶ 104 (Google-Intuit); *see also id.* ¶¶ 58-61 (Pixar-Lucasfilm).[10])

The distinction between no-hire agreements and non-solicitation agreements is critical because § 16600 is directed only at agreements that restrain an employee from actually "engaging in" his or her chosen "profession, trade or business." Cal. Bus. & Prof. Code § 16600. Non-solicitation agreements, on the other hand, "only slightly affect[] employees . . . [because employees] are not hampered from seeking employment with [ ] nor from contacting [the competing employer]. All they lose is the option of being contacted by [that employer] first. It does not restrain them from being employed by [the competing employer]." *Loral Corp. v. Moyes*, 174 Cal. App. 3d 268, 279-80 (1985) (upholding the validity of a provision that prohibited a former employee from raiding the company's employees for a competing business); *see also*

[10] Though the heart of Plaintiffs' Complaint is the purported agreements not to solicit employees through cold calling, Plaintiffs also allege that one of the alleged bilateral agreements included "agreements to notify each other when making an offer to another's employee" and "agreements that, when offering a position to another company's employee, neither company would counteroffer above the initial offer." (Compl. ¶ 61.) Like the purported non-solicitation agreements, these alleged terms do not implicate section 16600 because they did not prohibit those companies from hiring any employees and, therefore, did not involve any "restraint [on] [employees] from engaging in a lawful profession, trade, or business of any kind." Cal. Bus. & Prof. Code § 16600.

Buskuhl v. Family Life Ins. Co., 271 Cal. App. 2d 514, 522-23 (1969) (holding that a provision that prohibited a former employee from recruiting other employees away from his former employer was "not such an inhibition upon a former employee's right to engage in trade, business, or profession as to be within the proscription of section 16600"). Therefore, while a no-hire agreement may give rise to liability under § 16600, a non-solicitation agreement "does not violate section 16600." *Thomas Weisel*, 2010 WL 546497, at *4-6.

Thomas Weisel is instructive. There the defendant moved to dismiss claims for breach of an employment agreement and the covenant of good faith and fair dealing on the ground that the agreement in question was void because it violated section 16600. *Id*. at *1-3. The defendant had left Thomas Weisel to go to a competitor and then recruited and hired his former team from Thomas Weisel. That conduct was proscribed by his employment agreement, which prohibited the defendant from "recruit[ing] . . . or attempt[ing] to recruit" Thomas Weisel employees, as well as from "hir[ing] or attempt[ing] to . . . hire" Thomas Weisel employees. *Id.* at *2.

Faced with an agreement that contained both "no hire" and "no solicitation" language, the court found that "it is crucial to distinguish among the differing types of contractual provisions that might implicate a section 16600 violation." *Id*. at *3. The court held that while the "no hire" provisions were "unenforceable," the "'no solicitation' language"—to "not recruit . . . or attempt to recruit . . . directly or by assisting others"—"does not violate section 16600." *Id*. at *3-4. It held: "In the instant case, the non-solicitation clause contains permissible confidentiality and 'no solicitation' language alongside the impermissible 'no hire' language. The 'no hire' language can simply be voided without requiring any rewriting of the agreement by the court." *Id*. at *7. The court thus allowed the contractual breach claims to proceed "insofar as they rely upon the confidentiality and non-solicitation provisions" that did not violate section 16600. *Id*. at *9.

The same result follows here. Because Plaintiffs' section 16600 claim is based on alleged "agreements not to recruit each other's employees," rather than no-hire agreements (Compl. ¶ 1), Plaintiff does not—and cannot—state any claim for relief. A non-solicitation agreement—"not to recruit"—like Plaintiffs allege here, simply "does not violate section 16600." *Thomas Weisel*,

2010 WL 546497, at *4; *accord Loral*, 174 Cal. App. 3d at 279-80.[11] Accordingly, the Court should dismiss Plaintiffs' section 16600 claim as to all Defendants with prejudice.

III. PLAINTIFFS FAIL TO STATE A CLAIM UNDER CALIFORNIA BUSINESS AND PROFESSIONS CODE § 17200

Plaintiffs' fourth cause of action, for violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*, also must be dismissed. Plaintiffs have failed to allege facts sufficient to state a UCL claim, they have not "lost money or property" as required to pursue a UCL claim, and they are ineligible for any relief under the UCL.

A. Plaintiffs Have Not Adequately Pleaded Unfair Competition.

The UCL "prohibits, and provides civil remedies for, unfair competition, which it defines as 'any unlawful, unfair or fraudulent business act or practice.'" *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 320 (2011) (quoting Cal. Bus. & Prof. Code § 17200). Plaintiffs recite all three grounds for relief in their Complaint. (*See* Compl. ¶ 145.)

The Complaint alleges no fraudulent conduct, much less particularized allegations of "actual reliance on [ ] allegedly deceptive or misleading statements . . . ." *In re Tobacco II Cases*, 46 Cal. 4th 298, 306 (2009). S*ee Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) ("Rule 9(b)'s heightened pleading standards apply to claims for violations of the . . . UCL"). Accordingly, Plaintiffs have failed to allege a "fraudulent business act or practice."

Plaintiffs' claim of "unlawful" and "unfair" conduct likewise fails because Plaintiffs have failed to allege a violation of the Sherman Act, the Cartwright Act, or section 16600. *SC Manufactured Homes, Inc. v. Liebert*, 162 Cal. App. 4th 68, 93 (2008); *see also, e.g., Digital Sun v. Toro Co.*, 2011 WL 1044502, at *5 (N.D. Cal. Mar. 22, 2011) ("Because the Sherman Act

[11] Similarly, the alleged agreement requiring notification and no counter-offering does not violate section 16600 because those alleged terms provide no bar or penalty to any of their employees being hired by the other. They are therefore not the type of activity barred by section 16600. *See, e.g., Loral*, 174 Cal. App. 3d at 279 (holding a "noninterference" restriction in an employment termination agreement did not violate section 16600, as it "[did] not appear to be any more of a significant restraint on [the departed employee's/competing employer's] engaging in his profession, trade or business than a restraint on solicitation of customers"); *Bach v. Curry*, 258 Cal. App. 2d 676, 681 (1968) (holding an employment contract condition was not an invalid restraint on trade under § 16600 since such provision did not restrain the employee from working for a competitor nor in any way overtly limit his freedom to seek other employment).

violation is insufficiently pled, it follows that [plaintiff] has also failed to plead any violation of the Unfair Competition Law."); *Facebook, Inc. v. Power Ventures, Inc.*, 2010 U.S. Dist. LEXIS 93517, at *44-45 (N.D. Cal. July 20, 2010) (dismissing UCL claim that was "premised on th[e] same conduct" as claim under the Sherman Act, on the ground that the Sherman Act claim was not sufficiently alleged).

While Plaintiffs clearly cannot premise a UCL claim for "unlawful" conduct on a failed antitrust claim, their claim of "unfair" conduct similarly fails. Courts routinely reject UCL claims of "unfair" conduct where the plaintiff failed to allege a viable antitrust claim based on the same conduct. *See Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375 (2001) ("[W]e hold that conduct alleged to be 'unfair' because it unreasonably restrains competition and harms consumers . . . is not 'unfair' if the conduct is deemed reasonable and condoned under the antitrust laws."). Moreover, a plaintiff cannot circumvent the pleading requirements of the antitrust laws when asserting a UCL claim based on anticompetitive conduct. To "permit a separate inquiry into essentially the same question under the unfair competition law would only invite conflict and uncertainty and could lead to the enjoining of procompetitive conduct." *Id.* (citation omitted). Plaintiffs have failed to plead a cause of action under the "unlawful," "unfair," or "fraudulent" prongs of the UCL, and their section 17200 claim should be dismissed.

B. Plaintiffs Lack Standing Because They Have Not Lost Money or Property.

Plaintiffs' claims also fail because they have not "lost money or property" as is required to maintain a UCL claim. UCL standing extends only to a "'person who has suffered injury in fact and has lost money or property' as a result of unfair competition." *Kwikset*, 51 Cal. 4th at 321 (quoting Cal. Bus. & Prof. Code § 17204). Plaintiffs cannot establish either. As explained above, Plaintiffs have failed to adequately allege injury in fact, and the UCL claim should be dismissed on that basis. *See id*. at 322 (holding that "injury in fact" necessary for UCL standing is the same as "injury in fact" necessary for Article III standing).

Moreover, Plaintiffs have failed to allege that they suffered the specific type of injury in fact required for UCL standing—"a personal, individualized loss of money or property in any nontrivial amount." *Id*. at 325. First, Plaintiffs' sweeping assertion that Defendants' agreements

may have influenced the "employee compensation" of "all salaried employees" by "fixing the compensation . . . at artificially low levels" (Compl. ¶¶ 46, 50, 108) does not establish "a personal, individualized loss of money or property" by Plaintiffs that was "caused by[ ] the unfair business practice." *Kwikset*, 51 Cal. 4th at 325, 322. As discussed above, apart from these vague and conclusory assertions, Plaintiffs fail to allege any facts that would support such a conclusion or explain how Plaintiffs themselves were injured. Moreover, Plaintiffs' theory would bypass the purpose of the UCL standing requirement "to eliminate standing for those who have not engaged in any business dealings with would-be defendants." *Id*. at 317. Plaintiffs do not allege how agreements between defendants who neither employed them nor entered into no-cold-call agreements with their employers could have caused them harm. For example, Hariharan's employer, Lucasfilm, allegedly entered into an agreement with only one other defendant, Pixar. Plaintiffs do not allege how agreements among the other Defendants would cause Lucasfilm either to refuse to "preemptively increase the compensation of its employees" (Compl. ¶ 49) or to set its "baseline compensation levels" at a lower amount (*id*. ¶ 52). The same is true for the remaining named Plaintiffs. And no Plaintiff alleges how this supposed wage suppression affected or foreclosed any compensation transaction, decision, or opportunity within the period that the alleged agreements were in effect. Nor have Plaintiffs adequately alleged how any purported conspiracy could have had this result.

Second, employee mobility is not "money or property," and thus is not the type of "economic injury" that could provide UCL standing. *Kwikset*, 51 Cal. 4th at 322. More importantly, Plaintiffs have failed to plead that their mobility was impaired by Defendants' conduct, much less that this impairment caused them to lose money or property. No Plaintiff alleges that he would have moved to work for another Defendant absent the Defendants' agreements, or that his ability to move to any of the other Defendants—or the hundreds of other companies in the area—was impaired in a way that caused a loss of money or property.

In sum, Plaintiffs' allegations fail to demonstrate how alleged agreements between a handful of companies—only four of which involved their employers—resulted in their loss of money or property. Accordingly, their UCL claim should be dismissed.

C. Plaintiffs Are Not Eligible for Any UCL Remedy.

Plaintiffs seek an injunction, declaratory relief, and restitution for defendants' alleged violation of the UCL—the only remedies available under the UCL. *See* Cal. Bus. & Prof. Code § 17203 (authorizing injunctive and restitutionary relief); *AICCO, Inc. v. Ins. Co. of N. Am.*, 90 Cal. App. 4th 579, 590 (2001) (permitting UCL plaintiff to seek declaratory relief). But Plaintiffs have not adequately alleged a right to any of these remedies. Thus, because "the only relief the UCL provides is unavailable here, [Plaintiffs'] UCL claim fails." *Doe v. Starbucks, Inc.*, 2009 WL 5183773, at *15 (C.D. Cal. Dec. 18, 2009). *See also Madrid v. Perot Sys. Corp.*, 130 Cal. App. 4th 440, 467 (2005) (affirming demurrer because plaintiff "failed to present a viable claim for restitution or injunctive relief (the only remedies available)").

As discussed below in Section IV, Plaintiffs lack standing to assert claims for injunctive or declaratory relief because they are former employees of four Defendants with no stated intention of seeking work from any of the Defendants in the future. The declaratory and injunctive remedies that Plaintiffs seek would do nothing to redress their alleged injuries, and they therefore lack standing to seek such relief.

Nor are Plaintiffs eligible for the "ancillary relief" of restitution under the UCL. *Kwikset*, 51 Cal. 4th at 337 (quotation marks and citation omitted). Plaintiffs request that this Court order "disgorgement and/or impos[e] a constructive trust upon Defendants' ill-gotten gains, freez[e] Defendants' assets, and/or requir[e] Defendants to pay restitution to Plaintiff and to all members of the class of all funds acquired by means of any act or practice declared by this Court to be an unlawful, unfair, or fraudulent [sic]." (Compl. ¶ 152(c).) But the UCL cannot support the sweeping remedies Plaintiffs seek. It is well-established that neither damages nor nonrestitutionary disgorgement can be recovered under the UCL. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1152 (2003). As the California Supreme Court consistently has held, "[u]nder the UCL, an individual may recover profits unfairly obtained to the extent that these profits represent monies given to the defendant or benefits in which the plaintiff has an ownership interest." *Id.* at 1148 (emphasis added). But the speculative higher compensation Plaintiffs allege all employees would have received cannot be characterized either as "monies

given to the defendant" or "benefits in which [Plaintiffs have] an ownership interest." *Id.*

First, "it is clear that [Plaintiffs are] not seeking the return of money or property that was once in [their] possession." *Id*. at 1149. Plaintiffs allege only that compensation was "fix[ed] . . . at artificially low levels," not that money was in fact taken from their possession. (Compl. ¶ 146.) Second, "the relief sought by [Plaintiffs] is not restitutionary under an alternative theory because [they have] no vested interest in the money [they] seek[] to recover." *Korea Supply*, 29 Cal. 4th at 1149. Plaintiffs are not claiming "earned wages that are due and payable pursuant to . . . the Labor Code." *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 178 (2000) (holding such wages the proper subject of restitution). Instead, they are claiming only what they might have negotiated and/or received in compensation absent the defendants' alleged agreement. (Compl. ¶ 32(h).) This amounts to nothing more than an "attenuated expectancy"—akin to a "lost business opportunity" or "lost revenue—which cannot serve as the basis for restitution." *Korea Supply*, 29 Cal. 4th at 1150-51 (compensation for lost business opportunity is not restitution). Thus, Plaintiffs are not entitled to any available form of relief under the UCL and their claim must be dismissed with prejudice for this reason as well.

IV. PLAINTIFFS LACK STANDING TO SEEK INJUNCTIVE OR DECLARATORY RELIEF BECAUSE THEY ARE FORMER EMPLOYEES AND THE ALLEGED CONDUCT HAS ALREADY BEEN ENJOINED BY THE DOJ CONSENT DECREES.

In each of their four claims, Plaintiffs ask the Court to enter a permanent injunction against Defendants. (Compl. ¶ 126 (seeking "a permanent injunction enjoining Defendants' [sic] from ever again entering into similar agreements in violation of Section 1 of the Sherman Act"); ¶ 135 (same for Cartwright Act); ¶ 143 (same for section 16600); ¶ 149 (seeking to have Defendants "permanently enjoined from continuing their violations of Business and Professions Code section 17200").) Plaintiffs also request declaratory relief as part of their section 16600 and UCL claims. (*Id*. ¶ 143 (seeking a "judicial declaration that Defendants' agreements and conspiracy are void as a matter of law under Section 16600"); ¶ 152 (requesting that "a judicial determination and declaration be made of the rights of Plaintiffs and Class members, and the corresponding responsibilities of Defendants").) This Court should dismiss Plaintiffs' claims for

injunctive and declaratory remedies because they lack standing to seek such relief.

Like any other action brought in federal court, a lawsuit seeking injunctive or declaratory relief cannot proceed without "first present[ing] an actual case or controversy within the meaning of Article III, section 2 of the United States Constitution." *Gov't Emps. Ins. Co. v. Dizol*, 133 F.3d 1220, 1222 (9th Cir. 1998). "The 'irreducible constitutional minimum' of standing requires that a plaintiff allege that he has suffered concrete injury, that there is a causal connection between his injury and the conduct complained of, and that the injury will likely be redressed by a favorable decision." *Arakaki v. Lingle*, 477 F.3d 1048, 1059 (9th Cir. 2007) (quoting *United States v. Hays*, 515 U.S. 737, 742-43 (1995)); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (announcing above-quoted three-part test for Article III standing). Accordingly, Plaintiffs are "entitled to injunctive relief only if [they] can show that [they] face[] a 'real or immediate threat . . . that [they] will again be wronged in a similar way.'" *Mayfield v. United States*, 599 F.3d 964, 970 (9th Cir. 2010) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)). To be eligible for declaratory relief, Plaintiffs also must "demonstrate that [they are] 'realistically threatened by a repetition of the violation.'" *Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006) (quoting *Armstrong v. Davis*, 275 F.3d 849, 860-61 (9th Cir. 2001)).

Here, Plaintiffs' allegations are insufficient on their face to establish standing to seek injunctive or declaratory relief. Plaintiffs are former employees of four of the Defendants (Adobe, Intel, Intuit, and Lucasfilm) with no stated intention of seeking work from any of the Defendants in the future. Their alleged injury is purely backward-looking and monetary—Plaintiffs assert that they would have made more money but for the purported conspiracy. The declaratory and injunctive relief they seek would do nothing to redress that alleged injury.

The United States Supreme Court's recent ruling in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), confirms Plaintiffs' lack of standing. There, in analyzing the makeup of a putative injunctive class under Federal Rule of Civil Procedure 23(b)(2), the Court explained that class members who were "no longer employed by Wal-Mart lack standing to seek injunctive or declaratory relief against its employment practices." *Id.* at 2559-60. Because former employees "have no . . . need for prospective relief," they have "no claim for injunctive or declaratory relief

at all." *Id.* at 2560.

Even before *Dukes*, the Ninth Circuit had held that former employees lack standing to sue for declaratory or injunctive relief. In *Walsh v. Nevada Department of Human Resources*, 471 F.3d 1033 (9th Cir. 2006), plaintiff lost her job with the State of Nevada and sued for discrimination under the Americans with Disabilities Act and sought injunctive relief ordering her employer to alter its employment policies. *Id.* at 1035. The court concluded that the plaintiff lacked standing because she had failed to satisfy the doctrine's redressability requirement. *Id.* Observing that the plaintiff was "no longer an employee of the Department," and that there was "no indication in the complaint that [she] has any interest in returning to work for the State or the Department," the court concluded that "she would not stand to benefit from an injunction requiring the . . . policies she requests at her former place of work." *Id.* at 1037. Without an allegation of a continuing employment relationship, a complaint does not adequately allege that a plaintiff is "subject to the activity sought to be enjoined." *Zanze v. Snelling Servs., LLC*, 412 F. App'x 994, 997 (9th Cir. 2011) (dismissing former employee's claims for declaratory judgment and injunctive relief against previous employer) (citing *Seven Words LLC v. Network Solutions*, 260 F.3d 1089, 1098-99 (9th Cir. 2001)). *See also Drake v. Morgan Stanley & Co.*, 2010 WL 2175819, at *6 (C.D. Cal. Apr. 30, 2010) ("[i]n the case of an employment action, a former employee lacks standing to sue for declaratory or injunctive relief because he may realize no benefit upon the successful prosecution of his claim."); *Guthrey v. Cal. Dep't of Corr. & Rehab.*, 2011 WL 1259835, at *2 (E.D. Cal. Mar. 30, 2011) ("As Plaintiff is no longer working for the CDCR, he has no standing to seek injunctive relief tailored to benefit current employees.").

So too here. Plaintiffs are no longer employees of the Defendants they previously worked for—or any other Defendants. (Compl. ¶¶ 16-20.) Nothing in the Complaint suggests that any of the Plaintiffs have any interest in returning to work at the Defendants they previously worked for or any of the other Defendant companies. Accordingly, Plaintiffs stand to gain nothing from the injunction and judicial declaration they seek. As far as the pleadings indicate, these Plaintiffs, who "currently ha[ve] no contractual relationship with Defendants and therefore [are] not personally threatened by their conduct," lack standing to pursue injunctive relief or declaratory

relief. *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1021-22 (9th Cir. 2004).

It makes no difference that Plaintiffs are suing on behalf of a putative class and not just as individuals. Again, the Ninth Circuit has settled this issue. "Unless the named plaintiffs are themselves entitled to seek injunctive relief, they may not represent a class seeking that relief. Any injury unnamed members of this proposed class may have suffered is simply irrelevant to the question whether the named plaintiffs are entitled to the injunctive relief they seek." *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999). Neither does it matter that Plaintiffs' Cartwright Act, section 16600, and section 17200 claims arise under California state law. "In federal court, Article III standing requirements are equally applicable to state law claims." *Jadwin v. Cnty. of Kern*, 2009 WL 2424565, at *6 n.2 (E.D. Cal. Aug. 6, 2009); *see also Hangarter*, 373 F.3d at 1022 (reversing district court ruling that plaintiff had standing to pursue injunctive relief under state law).

The fact that Plaintiffs have suffered no injury that would be redressed by the declaration and injunction they seek is reinforced by the fact that another federal court has already entered, and has retained jurisdiction to supervise, consent decrees granting Plaintiffs the relief they seek in this case. All Defendants entered into stipulated proposed judgments with DOJ, pursuant to which, subject to enumerated exceptions, they are "enjoined from attempting to enter into, entering into, maintaining or enforcing any agreement with any other person to in any way refrain from, requesting that any person in any way refrain from, or pressuring any person in any way to refrain from soliciting, cold calling, recruiting, or otherwise competing for employees of the other person." (Judgments § IV; *see also* Compl. ¶ 115.) This is the exact conduct Plaintiffs describe in their Complaint and ask this Court to prohibit.

Accordingly, any grant of injunctive relief in this case would be moot as duplicative of the final judgments. *Cf. Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 660 (1993) (affirming denial of class certification for UCL claims where defendant had already complied with an FDA consent decree addressing the alleged misconduct, rendering plaintiff's "prayer for injunction . . . effectively moot"); *Thompson v. Procter & Gamble Co.*, 1982 WL 114, at *2 (N.D. Cal. Dec. 8, 1982) (granting summary judgment for defendant on plaintiff's claim for injunctive relief since it

was "now moot" given that the defendant had removed the allegedly defective product from the market "and ha[d] entered a consent agreement with the FDA"). And there is no actual "case or controversy" to support a declaratory judgment claim. *Ctr. for Sci. in Pub. Interest v. Bayer Corp.*, 2010 WL 1223232, at *4 (N.D. Cal. Mar. 25, 2010). With the injunction in place in the DOJ consent decrees, Plaintiffs are under no present threat that Defendants will resume their alleged bilateral agreements or cause Plaintiffs any injury. There is no ongoing alleged behavior by any of the Defendants for this Court to condemn or restrain.[12]

CONCLUSION

For all of the above reasons, Plaintiffs' Consolidated Amended Complaint should be dismissed with prejudice pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1).

Dated: October 13, 2011

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[12] Principles of judicial comity also counsel in favor of dismissing Plaintiffs' claims for injunctive and declaratory relief. "The federal courts long have recognized that the principle of comity requires federal district courts—courts of coordinate jurisdiction and equal rank—to exercise care to avoid interference with each other's affairs." *W. Gulf Mar. Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 729 (5th Cir. 1985). Specifically, "[a] court may . . . in its discretion dismiss a declaratory judgment or injunctive suit if the same issue is pending in litigation elsewhere." *Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977). Thus, "[w]hen an injunction sought in one federal proceeding would interfere with another federal proceeding, considerations of comity require more than the usual measure of restraint, and such injunctions should be granted only in the most unusual cases." *Bergh v. State of Wash.*, 535 F.2d 505, 507 (9th Cir. 1976). In this case, the District Court for the District of Columbia has already resolved separate litigation concerning the same issues alleged here. That court has entered injunctions prohibiting the same actions Plaintiffs ask this Court to enjoin, and has retained jurisdiction to enforce its orders. A declaration or injunction by this Court could conflict with the other actions or otherwise interfere with its administration and oversight of the cases.

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ATTESTATION OF CONCURRENCE IN FILING

Pursuant to General Order No. 45, Section X(B) regarding signatures, I, Michael F. Tubach, hereby attest that concurrence in the filing of this Defendants' Notice of Motion, Joint Motion to Dismiss the Consolidated Amended Complaint, and Memorandum of Points and Authorities has been obtained from Defendants Intel Corp., Google Inc., Lucasfilm Ltd., Adobe Systems Inc., Intuit Inc., and Pixar.

Dated: October 13, 2011

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